CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 490

BUS AND TRANSPORT SECURITIES CORPORATION,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 3, 1935.

CERTIORARI GRANTED NOVEMBER 11, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 490

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vs.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1935.

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 63791

BUS AND TRANSPORT SECURITIES CORPORATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

APPEARANCES:

For Taxpayer: George R. Beneman, Esq., A. E. James, Esq.

For Comm'r: C. H. Curl, Esq., Hugh Brewster, Esq.

DOCKET ENTRIES

1932.

Apr. 2. Petition received and filed. Taxpayer notified. (Fee paid).

Apr. 4. Copy of petition served on General Counsel.

May 19. Answer filed by General Counsel.

June 18. Copy of answer served on taxpayer. General Calendar.

Nov. 8. Hearing set Dec. 13, 1932.

Nov. 21. Amended answer filed by General Counsel. Copy served 12/1/32.

Dec. 13. Hearing had before H. F. Seawell, Div. 4. Submitted on record. Briefs due in 60 days.

[fol. 2]

Dec. 21. Transcript of hearing of Dec. 13, 1932, filed.

1933.

Jan. 28. Brief filed by taxpayer:

Feb. 10. Brief filed by General Counsel.

June 15. Memorandum opinion rendered, H. F. Seawell, Div. 4. Judgment will be entered for respondent.

June 16. Decision entered, H. F. Seawell, Div. 4.

Sept. 13. Petition for review by U. S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer.

Sept. 13. Proof of service filed by taxpayer.

Oct. 18. Præcipe for record with proof of service thereon filed.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed April 2, 1932

The above-named taxpayer hereby petitions for a redetermination of the deficiency determined by the Commissioner, as set forth in his deficiency letter dated February 24, 1932, IT:AR:B-4-WR-60D, and as a basis for this proceeding sets forth the following:

I. Petitioner is a corporation organized under the laws of the State of New Jersey, with its principal place of business at 111 North Mountain Avenue, Montclair, New Jersey.

II. The notice of deficiency purports to have been mailed to petitioner on February 24, 1932; a copy of the said notice is attached hereto, marked "A", and made a part hereof.

III. The taxes in controversy are corporate income taxes for the calendar year 1929. The amount in controversy is the deficiency of $27,011.88.

[fol. 4] IV. The determination of the Commissioner is erroneous in that: In the audit of the petitioner's return for the said year 1929, the Commissioner has asserted that petitioner realized a taxable gain from an exchange of securities, as more fully hereinafter set forth.

V. The facts upon which petitioner relies in support of this proceeding are as follows:

(a) Prior to the transactions as hereinbelow set forth, C. Easman Jacobus, was the owner of practically all of the stock of two corporations—the Butler-Newark Bus Line, Inc. and the Boonton-Mt. Lakes-Newark Bus Lines, Inc. The stocks had cost C. Easman Jacobus $28,500.

(b) The Public Service Corporation of New Jersey, a corporation engaged in the rendering of public utilities services in the said State, desired to acquire the said two bus lines, and negotiated with the said C. Easman Jacobus. A plan for the said acquisition, hereinafter outlined, was devised and executed.

(c) The Public Service Coordinated Transport, a corporation affiliated with the said Public Service Corporation of New Jersey, caused to be organized under the laws of the State of New Jersey, the C. Easman Jacobus, Inc., a corporation, and in pursuance of the plan transferred to the said corporation in exchange for all of its capital stock 2500 shares, 6 per cent. cumulative preferred stock of the Public Service Corporation of New Jersey.

(d) C. Easman Jacobus personally caused to be organized the petitioner corporation, the Bus and Transport Securities Corporation, and caused petitioner to issue to him and his nominees all of its capital stock in the amount of 2000 [fol. 5] shares in exchange for all of the capital stock then issued and outstanding of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all in pursuance of the said plan.

(e) Thereupon the Public Service Coordinated Transport Company in pursuance of the said plan transferred to petitioner all the said capital stock of C. Easman Jacobus Inc., and petitioner transferred to the said Public Service Coordinated Transport Company all the said capital stocks of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all on March 29, 1929.

(f) The fair market value of the said stock of the said C. Easman Jacobus, Inc., at the time acquired by petitioner, in the said year 1929 was $274,062.50.

(g) Petitioner filed its return for the said year 1929 at or about the due date thereof and included therein no computation of gain or loss on any transaction or transactions as herein above set forth. The Commissioner audited the said return, determined that petitioner had realized a gain of $245,562.50 in the acquisition of the capital stock of C. Easman Jacobus, Inc. in the manner hereinabove stated, and as a result thereof determined the deficiency of $27,011.88, as hereinabove appealed from.

VI. Wherefore, petitioner prays that the Board order, determine and adjudge that no taxable profit was realized by it from the transactions above outlined or any of them, and that there is no deficiency due from petitioner for the

said year 1929, and grant such other and further relief as may be just.

Bus and Transport Securities Corp., By C. Easman Jacobus, President.

[fol. 6] *Duly sworn to by C. Easman Jacobus. Jurat omitted in printing.*

EXHIBIT "A" TO PETITION

(Copy)

Treasury Department

Washington

Feb. 24, 1932.

Bus and Transport Securities Corporation,
c/o C. Easman Jacobus,
111 North Mountain Avenue,
Montclair, New Jersey.

SIRS:

You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $27,011.88, as shown in the statement attached.

[fol. 7] In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, inter-

est will accumulate to the date of assessment of the deficiency.

Respectfully, David Burnet, Commissioner. By J. C. Wilmer, Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

[fol. 8] Statement

IT:AR:B-4
WR-60D

In re: Bus and Transport Securities Corporation, c/o C. Easman Jacobus, 111 North Mountain Avenue, Montclair, New Jersey.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$27,011.88	None	$27,011.88

In the determination of your tax liability careful consideration was given your protest dated September 19, 1921 in connection with the findings set forth in the revenue agent's report dated June 23, 1931, and the additional evidence submitted at a conference held in this office under date of February 8, 1932.

Net income disclosed by the return	None
Add:	
Taxable income:	
Profit on exchange of assets	$245,562.50

The exchange of stock resulting in the above amount of profit represented the assets, or property, of the exchanging corporations, and inasmuch as it appears that gain or loss must be recognized in a transaction of this nature under the provisions of section 112 of the Revenue Act of 1928, the computation of gain as set forth in the revenue agent's report has been approved.

The profit on exchange of assets for assets is computed as follows:

[fol. 9] Received 2,500 shares Public Service Corporation of New York market value date of exchange $109.625	$274,062.50
Cost of stock exchanged	28,500.00
Taxable profit	$245,562.50

Computation of Tax.

Net income subject to tax	$245,562.50
Income tax at 11%	27,011.88

BEFORE U. S. BOARD OF TAX APPEALS

ANSWER—Filed May 19, 1932

Now comes the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

I, II, III. Admits the allegations contained in paragraphs I, II and III.

IV. Denies the errors alleged in paragraph IV of the petition.

V (a) to (g) inclusive. Denies each and every allegation of fact contained in paragraph V of the petition which is contrary to or inconsistent with the determination of the Commissioner as set forth in the deficiency notice.

Denies that petitioner is entitled to any of the relief prayed for.

[fol. 10] Wherefore, it is prayed that the appeal be denied and the tax as shown in the deficiency notice be in all respects approved.

(Sgd.) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: C. H. Curl, Hugh Brewster, Special Attorneys, Bureau of Internal Revenue.

[fol. 11] BEFORE U. S. BOARD OF TAX APPEALS

AMENDED ANSWER—Filed November 21, 1932

Now comes the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and with the consent of the Board of Tax Appeals, files this, his amended answer.

I, II, III. Admits the allegations as set forth in paragraphs I, II and III of the petition.

IV. The respondent denies that he committed an error in the audit of the petitioner's return for the year 1929 and denies each and every allegation of error contained in the petition.

V. The respondent admits the allegations of fact as set forth in the petition under paragraph 5 (a) to (g) inclusive.

VI. The respondent denies that the petitioner is entitled to any of the relief prayed for in its petition.

Wherefore, it is prayed that the appeal be denied and the tax as shown in the deficiency notice be in all respects approved.

(Sgd.) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: C. H. Curl, Special Attorney, Bureau of Internal Revenue.

[fol. 12] BEFORE U. S. BOARD OF TAX APPEALS

MEMORANDUM OPINION—Entered June 15, 1933

SEAWELL:

The respondent determined petitioner's liability for corporate income tax for the year 1929 to be $27,011.88, which whole amount is in controversy.

The question presented in this proceeding is whether the petitioner realized a taxable gain from the exchange of certain stock which it owned for the entire capital stock of C. Easman Jacobus, Incorporated.

The facts are virtually stipulated, the material allegations of fact asserted in the petition being admitted in the amended answer, as follows:

The petitioner is a corporation organized under the laws of the State of New Jersey, with its principal place of business in Montclair, New Jersey.

Prior to the transactions as hereinbelow set forth, C. Easman Jacobus was the owner of practically all of the stock of two corporations—the Butler-Newark Bus Line, Inc., and the Boonton-Mt. Lakes-Newark Bus Lines, Inc. The stocks had cost C. Easman Jacobus $28,500.

The Public Service Corporation of New Jersey, a corporation engaged in the rendering of public utilities services in the said state, desired to acquire the said two bus lines, and negotiated with the said C. Easman Jacobus. A plan for the said acquisition, hereinafter outlined, was devised and executed.

The Public Service Coordinated Transport, a corporation affiliated with the said Public Service Corporation of New Jersey, caused to be organized under the laws of the State of New Jersey, the C. Easman Jacobus, Inc., a corporation, and in pursuance of the plan transferred to the said corpo- [fol. 13] ration in exchange for all of its capital stock 2,500 shares, 6 per cent. Cumulative Preferred Stock of the Public Service Corporation of New Jersey.

C. Easman Jacobus personally caused to be organized the petitioner corporation, the Bus and Transport Securities Corporation, and caused petitioner to issue to him and his nominees all of its capital stock in the amount of 2,000 shares in exchange for all of the capital stock then issued and outstanding of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all in pursuance of the said plan.

Thereupon the Public Service Coordinated Transport Company in pursuance of the said plan transferred to petitioner all the said capital stock of C. Easman Jacobus, Inc., and petitioner transferred to the said Public Service Coordinated Transport Company all the said capital stocks of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all on March 29, 1929.

The fair market value of the said stock of the said C. Easman Jacobus, Inc., at the time acquired by petitioner in the said year 1929 was $274,062.50.

The petitioner filed its return for the said year 1929 at or about the due date thereof and included therein no computation of gain or loss on any transaction or transactions as herein above set forth. The Commissioner audited the said return, determined that petitioner had realized a gain of $245,562.50 in the acquisition of the capital stock of C. Easman Jacobus, Inc., in the manner hereinabove stated, and as a result thereof determined the deficiency of $27,011.88, as hereinabove appealed from.

The law applicable to the issue here involved is found in the Revenue Act of 1928, the particular provisions being sections 111, 112 and 113.

[fol. 14] The petitioner contends that the transaction in question, as established by the facts is one falling within the provisions of section 112, dealing with the recognition of gain and loss and is covered by section 112 (b) (4) as further defined in section 112 (i).

The respondent, on the contrary, insists that the aforesaid transaction did not result in a reorganization, merger or consolidation and does not bring the case within any of the exceptions provided in section 112 (b) of the Revenue Act of 1928.

The numerous corporations and exchanges of stock between them shown by the facts tend to somewhat obscure the real issue, which is simply what was the transaction and the result therefrom in respect to gain or loss experienced by the petitioner when it exchanged with the Public Service Coordinated Transport Company property, in the form of capital stock of other corporations, costing it $28,500 for capital stock of another and different corporation owned by said Public Service Coordinated Transport Company (but not its own capital stock) and of the fair market value of $274,062.50 at the date of said exchange in 1929.

The record does not indicate that either the petitioner or the Public Service Coordinated Transport Company owned any of the capital stock of the other or that any of the stockholders of the one owned any capital stock of the other. It was purely a matter of exchanging property

consisting of stock of other corporations distinct from either of the parties to the transactions.

After the transaction, the two parties to it were (so far as shown by the record) separate and distinct operating companies, the owners of whose capital stock were not the same parties.

In Pinellas Ice & Cold Storage Co. v. Commissioner, 57 Fed. (2d) 188, which was affirmed by the United States Su- [fol. 15] preme Court January 9, 1933, 287 U. S. 462, the Court of Appeals, after quoting from section 203 (h) (i) of the 1926 Revenue Act (which is the same as section 112 (i) (1) of the 1928 Revenue Act) relative to the meaning of the term "reorganization," said:

> As applied to corporations the terms "merger" and "consolidation" have well known legal meanings. While the result is practically the same in either event, there is this difference. In a merger one corporation absorbs the other and remains in existence while the other is dissolved. In a consolidation a new corporation is created and the consolidating corporations are extinguished. In either event the resulting corporation acquires all the property, rights and franchises of the dissolved corporations and their stockholders become its stockholders. Royal Palm Soap Co. v. Seaboard Air Line Ry. Co., 296 Fed. 448; Bauvier's Law Dictionary (3rd Ed.) p. 2202, verbo "merger."

The transaction clearly was not a merger nor was it a consolidation; neither corporation was dissolved and no new corporation came into being. See Minnesota Tea Co., 28 B. T. A. —, for a complete discussion of the applicable law.

The petitioner may have intended to effect a reorganization and fall within the exceptions under section 112 of the 1928 Revenue Act, but we must determine the question upon what was actually done and not upon what may have been the design and purpose of the parties to the transactions. United States v. Phellis, 257 U. S. 156, 172; Weiss v. Stern, 265 U. S. 242.

Counsel for the petitioner cites Tulsa Oxygen Co., 18 B. T. A. 1283, as furnishing a very close parallel in the application of the principle relied on by petitioner in the instant case. The section of the law involved and con-

[fol. 16] strued in that case is not the same as the one relied on in the instant case and a careful consideration of the facts in the two cases shows they are not in all material respects the same. In the circumstances of the instant case, our determination in Tulsa Oxygn Co., supra, is not controlling.

In our opinion, the term "reorganization" as defined by section 112 (i) (1), supra, excludes both parties to the transaction in issue for it is not shown that either acquired a majority of the stock of the other or "substantially all the properties" of the other, and such being the case, the transaction in question fails to come within any of the exceptions under section 112 (b), supra, and under subdivision (a) of that section the difference between the $28,500 aforesaid and the $274,062.50, or $245,562.50 is taxable gain to the petitioner as asserted by the respondent and we so determine.

Judgment will be entered for the respondent.

BEFORE U. S. BOARD OF TAX APPEALS

DECISION—Entered June 16, 1933

Pursuant to the determination of the Board as set forth in its memorandum opinion entered June 15, 1933, it is

Ordered and decided: That there is a deficiency of $27,011.88 for the year 1929.

(Sgd.) H. F. Seawell, Member.

[fol. 17] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REVIEW OF DECISION BY THE UNITED STATES BOARD OF TAX APPEALS—Filed September 13, 1933

Now comes the petitioner, the Bus and Transport Securities Corporation, by its attorneys, George R. Beneman and A. E. James, and respectfully shows:

I. That this is a proceeding for review by the United States Circuit Court of Appeals for the Third Circuit of a decision of the United States Board of Tax Appeals entered on June 16, 1933, Docket No. 63791, redetermining deficiency in income taxes of petitioner for the calendar year 1929, in the amount of $27,011.88.

II. That your petitioner is a corporation organized under the laws of the State of New Jersey, having its principal place of business at 111 North Mountain Avenue, Montclair, New Jersey, and that its income tax return for the calendar year 1929 was filed with the Collector of Internal Revenue for the Fifth District of New Jersey, at Newark, N. J.

[fol. 18] III. That the nature of the controversy is as follows, to wit:

Whether or not the transfer of certain stock owned by petitioner to The Public Service Coordinated Transport Co. in return for which The Public Service Coordinated Transport Co. transferred to petitioner the entire capital stock of C. Easman Jacobus, Inc., resulted in a taxable gain within the meaning of the Revenue Act of 1928.

IV. That the case was submitted to the Board of Tax Appeals on petition, answer and amended answer, and that after due hearing thereon there was entered on June 16, 1933, an order of the Board determining a deficiency in the amount of $27,011.88.

V. That petitioner, being aggrieved by the conclusion of the Board of Tax Appeals that the transaction involving certain stock transfers was not a "reorganization" within the meaning of Section 112 (b), and that the exchange of stock resulted in a taxable gain, hereby petitions for a review of the decision of said Board by the United States Circuit Court of Appeals for the Third Circuit.

VI. That the petitioner's assignments of error are as follows:

(1) The Board of Tax Appeals erred in failing to make a literal application of the plain language of Section 112 (b) (4).

(2) The Board of Tax Appeals erred in holding that the exchange of stock between the Public Service Coordinated Transport Co. and the Bus and Transport Securities Corporation did not amount to a reorganization within the meaning of Section 112 (i) (1).

[fol. 19] (3) The Board of Tax Appeals erred in ordering that a judgment be entered for respondent and in failing to order the entry of a judgment for petitioner.

Bus and Transport Securities Corporation, By Geo. R. Beneman, A. E. James, Attorneys for Petitioner.

Duly sworn to by A. E. James. Jurat omitted in printing.

[fol. 20] BEFORE U. S. BOARD OF TAX APPEALS

PROOF OF SERVICE—Filed September 13, 1933

Honorable E. Barrett Prettyman,
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.

Re: Bus and Transport Securities Corporation, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 63791

SIR:

You are hereby notified that the petitioner in the above-entitled proceeding has on this thirteenth day of September, 1933, filed with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the said Board of Tax Appeals in the above-entitled matter. A copy of the petition for review and assignment of errors as filed are attached hereto.

Geo. R. Beneman, A. E. James, Attorneys for Petitioner.

Service of copy of above notice acknowledged this thirteenth day of September, 1933.

E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, Attorney for Commissioner of Internal Revenue.

[fol. 21] BEFORE U. S. BOARD OF TAX APPEALS

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed October 18, 1933

To the Clerk of the United States Board of Tax Appeals, Washington, D. C.:

SIR:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, Philadelphia, Pennsylvania, pursuant to the review taken in the above-entitled case and to include in such transcript of record copies duly certified as correct of the following documents:

(1) The docket entries of proceedings before the Board.

(2) Pleadings before the Board.

(a) Petition.

(b) Answer to petition.

(c) Amended answer.

(3) Memorandum opinion and decision of the Board including final order of redetermination.

(4) Petition for review, notice of filing petition for review and admission of service of copies thereof.

(5) This præcipe.

Respectfully, A. E. James, Geo. R. Beneman, Attorneys for Petitioner.

Service of a copy accepted October —, 1933.
E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

[fol. 22] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 23] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5308

BUS & TRANSPORT SECURITIES CORP., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER ASSIGNING JUDGES—Filed April 4, 1934

Appeal from the U. S. Board of Tax Appeals

And now, to wit: This fourth day of April A. D. 1934, it is ordered that Hon. Albert W. Johnson, District Judge for the Middle District of Pennsylvania, and Hon. William Clark, District Judge for the District of New Jersey, be, and they are hereby assigned to sit in above case in order to make a full court.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 24] Minute entry of argument and submission, April 4, 1934, omitted in printing.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5308

BUS AND TRANSPORT SECURITIES CORPORATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition for Review from the United States Board of Tax Appeals

Before Davis, Circuit Judge, and Johnson and Clark, District Judges.

OPINION.—Filed July 3, 1935.

CLARK, District Judge.

A taxing statute is drawn. Certain of its provisions work an injustice. They are modified. The modifications

are scrutinized, not in the spirit of their enactment, but according to the letter of their language. Procedure designed to fit that letter is devised. The courts are asked to appraise that devising (cf. our own opinion of two years ago, Geo. H. Clapp v. D. B. Heiner, Collector of Internal Revenue, 51 F. (2d) 224).

[fol. 26] An economy based on money might have eliminated the once universal practice of barter. That seems to have been the assumption of the draftsmen of the original (1916) income tax act. Its omission was repaired by section 202b of the 1918 act, whereby gain or loss from exchanges was included in express terms. The principal opinion does not require us to follow in any detail the subsequent improvement of the first provision. The history of the legislation is set forth in some detail in opinions filed in the Fourth and Second Circuits. C. H. Mead Coal Co. v. Commissioner of Internal Revenue, 72 F. (2d) 22; John J. Watts v. Commissioner of Internal Revenue, 75 F. (2d) 981. Curiously counsel did not cite us to a recent book devoted entirely to this rather narrow subject. (Reorganization and Other Exchanges in Federal Income Taxation, by Miller, Hendricks and Everett.) The struggle of the Congress to be fair with the taxpayer is made abundantly clear therein.

The statute in the form with which we are presently concerned is found in section 2112, Title 26, U. S. C. A. and reads:

"Recognition of Gain or Loss

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 2111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges solely in kind.—

(4) —Gain of Corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(i) Definition of reorganization.—As used in this section and sections 2113 and 2115—

[fol. 27] (1) The term 'Reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and

at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place or organization, however effected.

(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

The real party in interest in the case at bar is one C. Easman Jacobus. Prior to 1929 he was engaged in the transport bus business in Morris County, New Jersey. The citizens of that State will remember that about that time the Public Service Corporation realized that the advance of the motor vehicle art was making serious inroads upon its transportation by trolley. The highways and streets of the State were crowded with buses, all competing with the street cars of the Public Service. It became anxious to extend its trolley transport monopoly to gasoline propelled trackless vehicles, i. e., buses. These buses were generally owned in small units. One individual, either personally or through the corporate device, owned and operated a small fleet of buses on limited routes.

[fol. 28] In order to acquire this particular bus line, the Public Service Coordinated Transport Company was willing to afford Mr. Jacobus a handsome profit, namely, a quarter of a million dollars. To the lay mind this would seem to be easily "recognizable" as a gain. But then those without benefit of legal education would not "recognize" the possibilities of the "corporate reorganization" provisions of the Revenue Act. The case at bar arises out of such recognition by Mr. Jacobus' advisor or advisors. It fails in this court at least, because we happen to share the lay, rather than the legalistic, point of view.

Mr. Jacobus could have transferred the stock in his bus company to the Public Service Coordinated Transport Company for cash; he could have transferred it for some

form of obligation issued from that corporation, i. e., preferred stock, notes, bonds, et cetera. But then the fact of gain could not have been denied. So instead, each party to the sale created a new corporation and transferred the respective considerations, i. e., bus company stock and the preferred stock to the treasury of the two new corporations. Then the sellers corporation acquired all the stock in the buyers corporation. The memorandum filed by the Board of Tax Appeals indicates that it considered the transaction outside the technical terms of the statute. That is a solution. We prefer a more fundamental one.

It is our opinion that the provision of the Revenue Act invoked here is in no way applicable. The section is entitled, "The gain of a corporation." We are not dealing with the gain of any corporation. The gain is that of C. E. Jacobus and his alone. If he is to be allowed to disguise that gain by the creation of corporations, any attempt to tax gain is rendered nugatory. Obviously, any seller and any buyer can proceed exactly as the buyer and [fol. 29] seller did in this case. So for the payment of a small franchise tax and perhaps equally small legal fees, the gain becomes not a "gain" but a "reorganization." To so declare would make impossible taxation of receipts from appreciation of assets.

The Board of Tax Appeals is affirmed.

A true Copy: Teste:

—— ——, Clerk of the United States Circuit Court Court of Appeals for the Third Circuit.

[fol. 30] In United States Circuit Court of Appeals for the Third Circuit, March Term, 1934

No. 5308

Bus and Transport Securities Corporation, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Judgment—Filed July 3, 1935

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby affirmed.

Philadelphia, July 3, 1935.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 31] Clerk's Certificate to the foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 11, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is assigned for argument immediately following No. 187.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.